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Notes

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by
MICHAEL R. HEADLEY*

For now we see through a glass, darkly . . .

—1 *Corinthians* 13:12

Introduction

In 1984 I was a 22-year-old college student with a grade point average of 4.0, and I really wanted to do something with my life. One night someone broke into my apartment, put a knife to my throat and raped me.

During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.

When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.

I picked the same man in a lineup. Again, I was sure. I knew it. I had picked the right guy, and he was going to go to jail. If there

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> was a possibility of a death sentence, I wanted him to die. I wanted to flip the switch.
>
> When the case went to trial in 1986, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Junior Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.
>
> In 1987, the case was retried because an appellate court had overturned Ronald Cotton's conviction. During a pretrial hearing, I learned that another man had supposedly claimed to be my attacker and was bragging about it in the same prison wing where Ronald Cotton was being held. This man, Bobby Poole, was brought into court, and I was asked, "Ms. Thompson, have you ever seen this man?" I answered: "I have never seen him in my life. I have no idea who he is."
>
> Ronald Cotton was sentenced again to two life sentences. Ronald Cotton was never going to see light; he was never going to get out; he was never going to hurt another woman; he was never going to rape another woman. In 1995, 11 years after I had first identified Ronald Cotton, I was asked to provide a blood sample so that DNA tests could be run on evidence from the rape. I agreed because I knew that Ronald Cotton had raped me and DNA was only going to confirm that. The test would allow me to move on once and for all.
>
> I will never forget the day I learned about the DNA results. I was standing in my kitchen when the detective and the district attorney visited. They were good and decent people who were trying to do their jobs—as I had done mine, as anyone would try to do the right thing. They told me: "Ronald Cotton didn't rape you. It was Bobby Poole."
>
> The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent.[1]

The lengthy passage quoted above provides merely one of many examples of those who have been wrongfully convicted on the basis of inaccurate eyewitness testimony.[2] In fact, "incorrect eyewitness identifications appear to be the leading cause of wrongful criminal

1. Jennifer Thompson, Editorial, *I Was Certain, but I Was Wrong*, N.Y. TIMES, June 18, 2000, § 4, at 15.

2. Professor Donald Judges has written an article that provides a number of examples of defendants convicted of horrible crimes, largely on the basis of eyewitness testimony, who later had their convictions reversed when DNA tests proved that the defendants could not have committed the crimes for which they were convicted. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 231-32 (2000).

convictions in the American legal system."[3] In a recent study, subjects watched a staged purse-snatching on television and had a clear view of the criminal's face.[4] Only 14% of the subjects correctly chose the purse-snatcher out of a six person lineup.[5] These witnesses, provided with a clear view of the criminal, performed worse than if they had guessed at random!

Lineups are a standard control measure in eyewitness identifications.[6] Over 75,000 people become criminal suspects based on eyewitness identifications each year.[7] They are typically conducted in one of two ways. The standard or simultaneous lineup presents a number of "suspects" at the same time and a witness or victim chooses from those persons presented. Alternatively, a sequential lineup presents the "suspects" one at a time and asks the witness to decide at the time of presentation whether the subject matches his or her memory of the criminal.[8] Both lineup forms can be performed with live persons or with photographs.

The topic of eyewitness identification and specifically, lineup procedure, has received a great deal of attention recently. It has been the subject of numerous court decisions,[9] scholarly and popular articles,[10] a Department of Justice report,[11] and even an episode of "All Things Considered" on National Public Radio.[12] Although eyewitness identification procedures present a number of problems in general, there is ample research suggesting that simultaneous line-ups are prone to more error than sequential line-ups.[13] Despite the

3. John C. Brigham & Jeffrey E. Pfeifer, *Evaluating the Fairness of Lineups, in* ADULT EYEWITNESS TESTIMONY 201 (David F. Ross et al. eds., 1994) (citing C.R. Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518-44 (1986); *U.S. v. Wade*, 388 U.S. 218 (1967); P.M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965)).

4. R. Buckhout, *Nearly 2000 Witnesses Can Be Wrong*, 16 BULL. OF PSYCHONOMIC SOC. 307-10 (1980).

5. *Id.*

6. *Id.*

7. Atul Gawande, *Under Suspicion*, THE NEW YORKER, Jan. 8, 2001, at 50.

8. Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks* [hereinafter *Recommendations*], *in* ADULT EYEWITNESS TESTIMONY, *supra* note 3, at 223, 240. Lineups can also be conducted either with live subjects or by having the witness look through a series of photographs, but each of these scenarios can occur either sequentially or concurrently.

9. *See, e.g., infra* notes 130-131 and 139-140 and accompanying text.

10. *See supra* note 7 and *infra* notes 40-48 and accompanying text.

11. *See infra* notes 127-129 and accompanying text.

12. *All Things Considered: Interview with Professor Rod Lindsay on New Techniques for Witnesses to Identify Possible Suspects* (National Public Radio, July 23, 2001), *available at* 2001 WL 9435658.

13. PETER B. AINSWORTH, PSYCHOLOGY, LAW AND EYEWITNESS TESTIMONY 93 (Graham Davies & Ray Bull eds., 1998) [hereinafter AINSWORTH] (citing BRIAN L. CUTLER & STEPHEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS,

greater accuracy associated with sequential line-ups, most law enforcement agencies do not utilize sequential lineups.[14] In addition, the United States Supreme Court (the "Court") has never held that the Due Process clause requires law enforcement agencies to use sequential line-up procedures rather than simultaneous line-up procedures. The Court's failure to so hold is attributable to both (1) a hesitancy to rely on social science research and (2) a reluctance to perceive the Due Process clause as a normative mandate.

This Note argues that the Due Process clause requires law enforcement agents to employ, exclusively, the sequential lineup procedure. Part I of this Note presents evidence on the merits of sequential lineups drawn from a wide range of studies. Part II explores the relationship between science and the law and discusses why courts should not hesitate to rely on the social science research in the field of eyewitness identification. Part III traces both a moral and an historical basis for a normative notion of Due Process. Part IV concludes that courts should adopt a normative notion of Due Process and thereby, require law enforcement agencies to use sequential line-ups.

I. Eyewitness Identification

During the 1970's, a number of researchers turned their sights to eyewitness testimony with an eye toward improving eyewitness accuracy. This attention was deserved: a 1975 Rand Corporation study found that "the principal determinant of whether or not a case is solved is the completeness and accuracy of the eyewitness accounts."[15] Many law enforcement officials share this conviction.[16] In addition, the Devlin Report, an exhaustive report on identification evidence in the United Kingdom, found nearly a 75% conviction rate when eyewitness testimony constituted the only evidence.[17] One-half of these cases involved testimony by only one witness.[18] The drafters

PSYCHOLOGY AND THE LAW (1995) [hereinafter MISTAKEN IDENTIFICATION]; D.M. Thompson, *Eyewitness Testimony and Identification Tests, in* PSYCHOLOGY AND POLICING (N. Brewer & C. Wilson eds., 1995)).

14. Gawande, *supra* note 7, at 50-51.

15. RAND CORP., THE CRIMINAL INVESTIGATION PROCESS (1975), *cited in* AINSWORTH, *supra* note 13, at 98.

16. Glenn S. Sanders, *On Increasing the Usefulness of Eyewitness Research*, 10 LAW & HUM. BEHAV. 333, 334 (1986).

17. Lord Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (London, 1976) [hereinafter Devlin Rpt.], *cited in* AINSWORTH, *supra* note 13, at 63.

18. *Id.* Elizabeth Loftus conducted a study that supports these findings in which she demonstrated that the addition of an eyewitness identification to circumstantial evidence pointing to a suspect increased the percentage of subjects voting to convict from 18% to 72%. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9-10 (1979) (citing Elizabeth

of the Devlin Report recommended that "cases where identification was the only evidence against an accused should *not normally proceed.*"[19] Nevertheless, the report concluded that the gap between psychological research of the day and the practical necessities of the criminal justice system precluded them from stating that psychological research was "sufficiently widely accepted or tailored to the needs of the judicial process to become the basis for procedural change."[20] Today, however, "the scientific community is unanimous in finding that sequential lineups are fairer and result in more accurate identification."[21]

A. Overwhelming Evidence of Inaccuracy

In their oft-cited book, *Mistaken Identification*, Brian Cutler and Stephen Penrod conclude that eyewitnesses frequently make mistakes in their identifications.[22] A number of studies conducted since the 1970's have confirmed this inaccuracy. One of the more striking studies suggests that over 40% of wrongful convictions were for murder[23] and that about half of those wrongfully convicted spent between one and six years in prison.[24] That same study indicates that eyewitness misidentification was the most frequent kind of error, occurring in over 50% of the surveyed cases.[25] Considering the severe punishment for such crimes, inaccuracies that account for such convictions are intolerable. The Anglo-American system of justice has long recognized the principle that "it is better that ten guilty persons escape, than that one innocent suffer."[26]

Other research suggests further problems with lineup procedures. While investigating photographic identification procedures, Davies, Shepherd, and Ellis demonstrated that "the more photographs a witness examines, the more likely it is that he or she will pick out the wrong person."[27] In addition, one survey suggests

Loftus, *Reconstructing Memory: The Incredible Eyewitness*, [1974] 8 PSYCHOL. TODAY 116-19). Even with additional information showing that the eyewitness was legally blind and not wearing his glasses at the time of the events, 68% of subjects still voted to convict! *Id.*

19. Devlin Rpt. (emphasis added), *cited in* AINSWORTH, *supra* note 13, at 78.

20. Devlin Rpt. 71, *cited in* AINSWORTH, *supra* note 13, at 79.

21. *In re* Investigation of Thomas, 733 N.Y.S.2d 591, 595 (N.Y. App. Div. 2001).

22. MISTAKEN IDENTIFICATION, *supra* note 13, at 10-12.

23. Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 287 (1988).

24. *Id.* at 290.

25. *Id.* at 289. The study does, however, continue to state that most wrongful convictions involve a number of factors.

26. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

27. AINSWORTH, *supra* note 13, at 83 (citing G.M. Davies et al., *Effects of Interpolated Mugshot Exposure on Accuracy of Eyewitness Identification*, 64 J. APPLIED PSYCHOL.

"that witnesses can quite easily have their memories altered, often without their being aware of the fact."[28] Another study concludes that the "chances that a member of the public will correctly identify a person from a facial reconstruction are almost negligible."[29]

Elizabeth Loftus has even demonstrated that the mere wording of questions affects a witness's response about a particular situation.[30] This effect creates a real threat of suggestiveness during pre-trial line-ups[31] because the Federal Rules of Evidence only prohibit leading questions at trial.[32] Other research indicates that once witnesses select a suspect, they rarely reconsider the accuracy of the initial identification.[33] Moreover, Elizabeth Luus & Gary Wells recently found little correlation between the accuracy of an eyewitness identification and the eyewitness's confidence in her selection.[34] More than any other piece of research, this finding indicates a need for courts to take heed of current developments in social psychological research and proceed cautiously in accepting eyewitness testimony.

A sampling of New York police officers found that not a single officer indicated an awareness of the extensive published research on eyewitness identification, even though over 90% of the sample spoke about experiences with unreliable eyewitness testimony.[35] Just as important is the finding that many jurors "tend to rely on factors that are not diagnostic of eyewitness accuracy... [and] tend to

232-37 (1979); H.D. Ellis et al., *Identification From a Computer-driven Retrieval System Compared With a Traditional Mugshot Album Search: A New Tool For Police Investigations*, 32 ERGONOMICS 167-77 (1989)).

28. AINSWORTH, *supra* note 13, at 62.

29. R.H. Logie et al., *Face Recognition: Pose and Ecological Validity*, 1 APPLIED COGNITIVE PSYCHOL. 53-69 (1987).

30. LOFTUS, *supra* note 18, at 94-97.

31. PETER B. AINSWORTH, PSYCHOLOGY AND POLICING IN A CHANGING WORLD 20-26 (1995).

32. FED. R. EVID. 611(c).

33. J.C. Brigham & D.L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. APPLIED SOC. PSYCHOL. 1394-1410 (1988); MISTAKEN IDENTIFICATION, *supra* note 13, at 107. *See also* LOFTUS, *supra* note 18, at 55 (noting that "[p]ostevent information can not only enhance existing memories but also change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory"). In *United States v. Wade*, the Court noted that " '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" 388 U.S. 218, 229 (1967) (quoting Williams & Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 482).

34. C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, *in* ADULT EYEWITNESS TESTIMONY, *supra* note 3, at 348, 358-59.

35. Sanders, *supra* note 16, at 334. Sanders notes that the officers "cited numerous examples of abundant and diverse eyewitness errors" of the same types as those independently observed in psychological experiments focusing on this issue.

overestimate eyewitness accuracy" even though they know of the potential for inaccuracies in eyewitness testimony.[36] Taken together, these studies demonstrate the fallibility of the human mind in the context of eyewitness identification, and cast a shadow of doubt over trials that rely on eyewitness testimony.

B. Sequential Lineup Research

Gary Wells' pioneering work on eyewitness identification during the mid-1970s and early 1980s serves as the foundation for today's research. In a recent article, Wells and his co-author noted that the "account one gets from an eyewitness depends very much on the methods used to solicit the information."[37] Although the authors are "not yet prepared to recommend that all lineups be conducted sequentially,"[38] they stated that, "in general, we endorse the sequential line-up procedure."[39]

In a 1995 article with fellow Professor Eric Seelau, Wells concluded that "a sequential procedure produces fewer false identifications than does a simultaneous procedure with little or no decrease in rates of accurate identification."[40] Wells and Seelau posit that the improved accuracy results from the shift from comparisons between lineup members to a comparison between the witness's memory and the lineup members.[41] Another researcher has suggested

36. Jennifer L. Devenport, Stephen D. Penrod, & Brian L. Cutler, *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL., PUB. POL'Y, & L. 338, 353 (1997).

37. *Recommendations*, *supra* note 8, at 223. *See also supra* note 30 and accompanying text.

38. *Id.* at 241. The authors did not recommend the use of sequential lineups across the board because the potential inability to keep the lineup administrator blind to the identity of the actual suspect might increase the likelihood that he would communicate the identity of the suspect to the eyewitness. *Id. See also* Russell Contreras, *More Courts Let Experts Debunk Witness Accounts*, WALL ST. J., Aug. 10, 2001, at B1 (quoting a psychologist who testifies frequently about memory as saying that "[d]one incorrectly, sequential lineups make it easier for police to lead eyewitnesses toward a particular suspect").

39. *Recommendations*, *supra* note 8, at 241.

40. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL., PUB. POL'Y. & L. 765, 772 (1995) (citing Brian L. Cutler & Stephen D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281-90 (1988); R.C.L. Linsday et al., *Sequential Lineup Presentation: Technique Matters*, 76 J. APPLIED PSYCHOL. 741-45 (1991); R.C.L. Lindsay et al., *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796-802 (1991); R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications From Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556-64 (1985); S.L. Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22-33 (1993)).

41. *Id.* Researchers refer to witnesses' practice of comparing the members in a traditional lineup against each other rather than against their own memories as the

that sequential lineups reduce the number of inaccurate identifications because they "encourage witnesses to make absolute judgments . . . instead of comparative or relative judgments."[42]

Some academics argue that lineups need not be perfect because eyewitness identifications serve a diagnostic function.[43] This argument is problematic, however, because research shows "that innocent suspects are far more likely to be identified in otherwise fair target-absent lineups, when they are only more similar to the real perpetrator than the foils."[44] In fact, studies show the misidentification rate for blank lineups (containing only subjects known to be innocent) to be extremely high, ranging anywhere from 81-93%.[45] The basis for this type of misidentification may lie in the fact that witnesses view lineups as problems to be solved[46] and believe that they must choose at least one from the lineup.[47] A sequential lineup would help to alleviate this problem in that it would prevent the witness from making comparative judgements.[48]

II. Science and the Law

Before holding that Due Process requires law enforcement agencies to utilize sequential lineup procedures, the Court must be willing to acknowledge the reliability of the social scientific research in this area.

A. Science in the Court

Traditionally, the courts have been reluctant to use scientific evidence in trials. Professor David Faigman notes the fundamental

"relative judgment process." For a discussion of the research on the relative judgment process, *see id.* at 772-73.

42. Michael R. Leippe, *The Case for Expert Testimony about Eyewitness Memory*, 1 PSYCHOL., PUB. POL'Y, & L. 909, 918 (1995) (citations omitted).

43. D. Navon, *How Critical is the Accuracy of an Eyewitness Memory: Another Look at the Issue of Lineup Diagnostics*, 75 J. APPLIED PSYCHOL. 506-10 (1990), *cited in* Willem A. Wagenaar, *Anchored Narratives: a Theory of Judicial Reasoning, and its Consequences* [hereinafter *Anchored Narratives*], *in* PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE: INTERNATIONAL DEVELOPMENTS IN RESEARCH AND PRACTICE 267, 277-78 (Graham Davies et al. eds., 1996).

44. Wagenaar, W.A., *The Forensic Context of Lineup Tests* (1993) *cited in Anchored Narratives, supra* note 43, at 277.

45. ADULT EYEWITNESS TESTIMONY, *supra* note 3, at 80, 85 (citations omitted).

46. J. Don Read, *Understanding Bystander Misidentifications: The Role of Familiarity and Contextual Knowledge*, *in* ADULT EYEWITNESS TESTIMONY, *supra* note 3, at 56, 77.

47. *Id.*

48. Law enforcement agencies that do not adopt a sequential lineup procedure might temper this problem by informing witnesses that the lineup does not necessarily include a suspect, thereby limiting the witness's impulse simply to choose the best fit among the choices. *See generally Recommendations*, *supra* note 8, at 236-37.

tension between scientific and legal inquiries and explains its basis in terms of the two systems' different standards for acceptable confidence and uncertainty.[49] As early as 1923, the D.C. Court of Appeals set the tone for the admissibility of expert testimony in *Frye v. U.S.*,[50] when it found scientific expert testimony to be admissible only if based on techniques that were "generally accepted" as reliable in the scientific field as to which the expert is testifying.[51] This stringent standard excluded a great deal of testimony based on methodologies whose value was subject to debate in the relevant scientific field.[52] In 1993, the Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, held that the Federal Rules of Evidence supersede the *Frye* standard in federal criminal trials.[53] Further, the Court held that under the Federal Rules of Evidence, the issue of admissibility turns on whether the trial judge finds the expert testimony both reliable and relevant as a matter of law.[54] Today, the admissibility of expert testimony remains an issue of law subject to abuse-of-discretion review.[55] For social science research in this area to be admitted in trial, it would have to satisfy the *Daubert* standard for admissibility.

B. The Social Sciences and the Law

One survey of case-law and literature places the first use of a psychologist as a witness in a 1931 Arkansas case, *Criglow v. State*.[56] That case ironically involved a claim of mistaken identity.[57] The *Criglow* court excluded the expert testimony on the ground that "one man as well as another might form an opinion" as to the witnesses' claims of mistaken identification.[58] The *Criglow* decision demonstrates a fear that juries will accept so-called "expert"

49. DAVID L. FAIGMAN, LEGAL ALCHEMY 66-70 (1999) [hereinafter FAIGMAN].

50. 293 F. 1013 (1923).

51. *Id.* at 1014.

52. *See, e.g.*, U.S. v. Scheffer, 523 U.S. 303, 328 (1998) (noting that "under the regime established by *Frye v. United States*, scientific evidence was inadmissible unless it met a stringent 'general acceptance' test"); David E. Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 390 (2001); Paul B. Tyler, *The Kelly-Frye "General Acceptance" Standard Remains the Rule for Admissibility of Novel Scientific Evidence: People v. Leahy*, 22 PEPP. L. REV. 1274, 1288-91 (1995) (discussing the exclusion of DNA evidence in the early 1990's under California's application of the *Frye* test).

53. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 589 (1993).

54. *Id.* at 597.

55. *See, e.g.*, General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997).

56. Criglow v. State, 36 S.W.2d 400 (Ark. 1931).

57. AINSWORTH, *supra* note 13, at 156-57.

58. *Criglow*, 36 S.W.2d at 401.

testimony without a critical eye and accords with the old *Frye* standard governing the admissibility of scientific evidence.[59]

Brown v. Bd. of Educ.[60] is cited as the beginning of the Court's willingness to rely on social science evidence "with any regularity."[61] Professor Herbert Hovenkamp marks this change as revolutionary for its abandonment of "a longstanding legal tradition of refusing to give explicit credit to intellectual sources from outside lawyers' jurisprudence."[62] Hovenkamp discounts the weight others place on Justice Brandeis's use of non-statutory information in the dissent in *Adams v. Tanner*,[63] but Brandeis's role in leading the Court into the age of scientific progress cannot be overstated. In *Muller v. Oregon*,[64] a post-*Lochner* Court upheld workplace regulations for women at least partially on the basis of scientific evidence.[65] The Court relied in part on a lengthy brief, filed by future Justice Brandeis, that marshaled statistical and scientific evidence in support of the proposition that long working hours hurt women.[66] The practice of submitting arguments to the court utilizing an interdisciplinary approach to legal scholarship that incorporates sociological, statistical, and economic information blossomed after *Muller*, and such briefs have come to be known as Brandeis Briefs in honor of the late justice who pioneered such an integrative view of the lawyer's quest for truth.[67]

Professor Kenneth Culp Davis argues for the increased use of such legislative facts[68] in the judicial context, noting "[t]hat

59. *See generally supra* notes 50-51 and accompanying text.

60. 347 U.S. 483 (1954).

61. *See id.* at 494 n.11; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 400 (1988). In a footnote accompanying this text, Hovenkamp notes that the Court, in 1917, received "a 200-page social science brief on race discrimination, but did not refer to it in its opinion" in *Buchanan v. Warley*, 245 U.S. 60 (1917). *Id.* at 400 n.109 (citing Hovenkamp, *Social Science and Segregation before* Brown, 1985 DUKE L.J. 624, 657-63). Hovenkamp also notes the Court's reliance upon Brandeis Briefs in both *Muller v. Oregon*, 208 U.S. 412, 419 (1908) and *Adkins v. Children's Hosp.*, 261 U.S. 525, 559-60 (1923), although the court did not cite to the non-statutory sources in these briefs. *Id.*

62. *Id.*

63. 244 U.S. 590, 597 (1917). Justice Brandeis's dissent in *Adams* cited both law review articles and a social science journal. *See id.* at 605 n.6 (Brandeis, J., dissenting) (citing W.M. Leiserson, *Public Employment Offices*, 29 POL. SCI. Q. 36 (1914)); *id.* at 613-15 nn.21-25 (Brandeis, J., dissenting) (citing several articles in the American Labor Legislation Review).

64. 208 U.S. 412 (1908).

65. *Id.* at 419-21.

66. *See id.* at 419.

67. Donald L. Burnett, Jr., *The Brandeis Vision*, 37 BRANDEIS L.J. 1, 5 (1998) (citing Philippa Strum, *Brandeis and the Living Constitution*, *in* BRANDEIS AND AMERICA 120 (Nelson L. Dawson ed., 1989)).

68. Professor Davis, in his now famous article, distinguished between adjudicative

fundamental procedure (of working with those affected by government decisions) is tending to become the essence of democratic government on complex issues, except when courts are lawmakers."[69] Davis goes on to criticize courts as the new legislative bodies, blindly creating law, "often, without a factual base."[70]

Reliance upon legislative facts[71] in the form of scientific studies would not present a radical break from tradition for the Court. Since its 1954 ruling in *Brown*,[72] the Court has relied upon scientific evidence in a range of cases,[73] using such information to support decisions including those limiting States' authority to regulate abortions[74] and mandating a minimum jury size.[75] Nevertheless, reliance on social scientific evidence seems unlikely, given the current limitations on the use of such research.

C. Is Justice Blind?

In *Craig v. Boren*,[76] Justice Brennan expressed the judiciary's tenuous relationship with science when he stated that "[i]t is unrealistic to expect . . . members of the judiciary . . . to be well versed in the rigors of experimental or statistical technique."[77] Professor David Faigman argues that there has been no improvement in the Court's understanding of scientific method in the past 25 years.[78] Justice Powell has admitted that "[m]y understanding of statistical analysis . . . ranges from limited to zero."[79] Professor Faigman succinctly identified the long-term effect of the Court's approach

facts, those facts associated with information in the record, and legislative facts, outside information relevant to a particular situation. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942). Although Professor Davis wrote about the administrative process, his terms present a close fit with the experience of presenting scientific research beyond the scope of the record to assist judges with questions of law and policy.

69. Kenneth Culp Davis, The William B. Lockhart Lecture, *in Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 8 (1986).

70. *Id.*

71. *See supra* note 68.

72. 347 U.S. 483 (1954).

73. Professor David Faigman notes that *Brown* "marks the modern era of the Court's explicit use of scientific research in constitutional law." FAIGMAN, *supra* note 49, at 101 (citing John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 483-84 (1986)).

74. Roe v. Wade, 410 U.S. 113 (1973).

75. Ballew v. Georgia, 438 U.S. 223 (1978).

76. 429 U.S. 190 (1976).

77. *Id.* at 204.

78. FAIGMAN, *supra* note 49, at 101.

79. *Id.* at 118.

when he stated that "persistent misapplication of empirical data undermines the Court's legitimacy."[80]

Thankfully, the use of expert witness testimony about memory "is becoming more and more common" in the United States.[81] Nevertheless, one practitioner has pointed out that although some courts are slowly beginning to admit expert testimony on eyewitness identification, most courts are likely to rule that such testimony is inadmissible.[82] Others disagree, however, and suggest that "the body of knowledge upon which eyewitness expert testimony is predicated more than meets the criteria for admissibility set forth in *Daubert*."[83] Even if the Court refuses to rely on the scientific evidence on eyewitness identification and mandate sequential lineups, juries are increasingly likely to learn of the potential for error in eyewitness testimony.

III. Due Process

Both the 5th and 14th Amendments to the Constitution guarantee that no person shall be deprived "of life, liberty, or property, without due process of law." A discussion of the proper scope of the Due Process Clauses, however, requires an inquiry into the history and evolution of the term "due process." A close

80. *Id.* at 116.

81. AINSWORTH, *supra* note 13, at 4.

82. *See* James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Trials*, THE CHAMPION, Feb. 1998, at 12-13 (noting that "hostility to expert testimony on eyewitness identification remains strong") (citing United States v. Labanstat, 94 F.3d 527 (9th Cir. 1996)(denying defendant public funds for an eyewitness identification expert and affirming rejection of jury instruction on reliability of eyewitness identification); United States v. Kime, 99 F.3d 870 (8th Cir. 1996)(finding in-court identification reliable and affirming exclusion of expert testimony on such identifications)); *see also* Judges, *supra* note 2, at 285. Although Judges fails to cite specific instances of courts excluding expert testimony regarding problems with eyewitness identification inaccuracies, his observation accords with that of Doyle, a seasoned trial and appellate attorney and former professor at Georgetown Law Center. Other writers also describe with particularity the exclusion of evidence in this field. *See, e.g.*, Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 BEHAV. SCI. & L. 229, 230-44 (1995) (noting that "the admission of expert psychological testimony on eyewitness memory appears to be the exception rather than the rule.").

83. Penrod et al., *supra* note 82, at 256. Penrod and his colleagues express concern, though, that *Daubert* will not have a major impact on decisions regarding the admissibility of eyewitness expert testimony. *Id.* at 244. In spite of their concerns for the impact of the *Daubert* standard in state court, the New York Court of Appeals recently found expert testimony regarding eyewitness identifications not to be inadmissible per se. People v. Lee, 750 N.E.2d 63, 67 (2001) (affirming the decision, though, on grounds that the trial court subsequently considered a renewed request for the introduction of expert testimony). *See also* Contreras, *supra* note 38 (noting that "most states now allow defense attorneys to call experts to explain the potential flaws of eyewitness testimony").

inspection of the philosophical underpinnings of that phrase reveals its normative claim, thus requiring more than a minimum of procedural safeguards.

A. Political Philosophy

J.S. Mill's treatise *On Liberty* begins with a recognition that "[t]he struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar."[84] Mill goes on to note that because the theoretical notion of "self-government" is not necessarily true in practice, democratic societies have a need to safeguard the rights of under-represented classes.[85] By limiting the power of the federal and state governments, the Bill of Rights serves as such a safeguard and provides a foundation for the notions of liberty and justice that the American people recognize as a birthright.[86]

In his landmark work *A Theory of Justice,* John Rawls stated that "one legal order is more justly administered than another if it more perfectly fulfills the precepts of the rule of law."[87] In his view, the proper method for laying the foundation of a truly just society is to require that rules be chosen behind a "veil of ignorance."[88] This theoretical model permits lawmakers to understand the workings of human societies, but asks them to formulate laws as though they do not know the positions in society they will inhabit once the rules have been established. Rawls stated that "[t]he aim (of having people choose from the original position behind a veil of ignorance) is to use the notion of pure *procedural* justice as a basis of theory."[89] The Supreme Court would serve the American public well by grounding its view of justice in such an idealized, albeit abstract, world.

Continuing his treatment of justice, Rawls states that "[o]ne kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly."[90] Although Rawls clarifies that this statement relates to "regularity" as a necessary element of justice,[91] his explanation should not be interpreted to ignore the normative aspect of judicial decisionmaking because it requires judges to choose the "appropriate rule" to apply.

84. JOHN STUART MILL, ON LIBERTY, *in* THREE ESSAYS 5 (Oxford University Press 1975) (1859).

85. *Id.* at 8-9.

86. The pledge of allegiance, for instance, notes that the flag of the United States represents a republic "with liberty and justice for all."

87. JOHN RAWLS, A THEORY OF JUSTICE 236 (2d prtg. 1972).

88. *Id.* at 12.

89. *Id.* at 136 (emphasis added).

90. *Id.* at 235.

91. *Id.*

Given the veil of ignorance that Rawls would impose on those who create rules, it is safe to presume that the "appropriate rule" in the procedural context would be the most accurate of the available procedures.

Rawls characterizes due process as "a process reasonably designed to ascertain the truth . . . ."[92] In spite of his use of the legally murky term "reasonably," Rawls' description of due process, taken in conjunction with his earlier statements about justice, suggests the relative injustice of a legal system that utilizes procedures known to be less accurate than others. Because sequential lineups are more accurate, their use would "more perfectly fulfill[] the precepts of the rule of law."[93] Therefore, the failure to utilize sequential lineups delivers a process at odds with philosophical notions of what is "due."

B. The American History of Due Process

The state police powers "were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained."[94] State laws that conflict with the Constitution, however, are invalid under the Supremacy Clause.[95] Because the Fifth Amendment's Due Process Clause is directed toward the federal government, the Fourteenth Amendment's Due Process Clause serves as the basis for much of the criminal procedure jurisprudence because criminal law traditionally lay within the sphere of local authority.[96]

(1) A Venerable Pedigree

It is difficult to pinpoint the precise intention behind the insertion of the due process clause into the Fourteenth Amendment, much less the earlier Fifth Amendment.[97] One scholar has traced the roots of the phrase "due process of law" back to the 14th Century statute 28 Edward III.[98] The Supreme Court has noted that "[t]he words, 'due process of law,' were undoubtedly intended to convey the

92. *Id.* at 239.

93. *Id.* at 236.

94. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558 (1902).

95. *Id.*

96. *See* U.S. v. Lopez, 514 U.S. 549, 559 (1995) (striking down the Gun Free School Zones Act). The Court in *Lopez* rejected the theory that the Commerce Clause granted Congress carte blanche with respect to criminal law when it limited federal authority under the clause to cover "action which 'substantially affects' interstate commerce." *Id.*

97. HORACE EDGAR FLACK, PH.D., THE ADOPTION OF THE FOURTEENTH AMENDMENT 66-67 (Peter Smith 1965) (1908).

98. *See* Edward S. Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 91 (1948).

same meaning as the words, 'by the law of the land,'[99] in [the] Magna Charta. Lord Coke, in his commentary on those words, (2 Inst. 50,)[100] says they mean due process of law."[101] Edward Corwin's research into the evolution of the Due Process Clauses notes that both phrases were intended "to consecrate certain methods of trial."[102] In his seminal work, Democracy and Distrust, John Hart Ely echoed this sentiment when he stated that "the proper function of the Due Process Clause [is] that of guaranteeing fair procedures."[103]

In his treatise on constitutional law, published contemporaneously with the ratification of the 14th Amendment, Thomas Cooley suggested that "due process of law" supported a range of definitions "so various that some difficulty arises in fixing upon one which shall be accurate, complete in itself, and at the same time applicable to all cases."[104] Cooley cited the definition Daniel Webster gave for "the law of the land" in his presentation in the *Dartmouth College Case*: "[b]y the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."[105] Cooley's broad description of the notion of due process at the ratification of the 14th Amendment, with its guarantee of the "protection of the general rules which govern society," provides persuasive evidence that the words "due process of law" were meant to guarantee something more than a minimum of procedural fairness.

(2) History Unfolds

For almost seventy years after the ratification of the 14th Amendment in 1868, the Court adhered to a view of due process that guaranteed freedom of contract.[106] During this period, the Court

99. "per legem terrae"

100. 1 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50-51 (1642).

101. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272, 276 (1855).

102. CORWIN, *supra* note 98, at 114.

103. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 19 (1980).

104. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 353 (Boston, Little, Brown and Co. 1868).

105. *Id.* at 353-54 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat) 518, 581 (1819); 5 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 487 (Boston, Little & Brown 1851).

106. This period is often referred to as "the *Lochner* Era" in reference to the leading decision embodying this judicial philosophy in which the Court invalidated a New York law that limited the number of hours a baker could work each week to sixty. Lochner v.

struck down legislation aimed at combating perceived errors in the free market system including laws covering everything from minimum wages[107] to price regulations.[108] As industrialization and urbanization began to be felt throughout society during the early part of the 20th Century, however, such an idealized view of the free market system became increasingly strained. In his famous critique of the Court's reasoning, Justice Holmes stated that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics."[109] With its ruling in *West Coast Hotel* in 1937, the Court abandoned this lassiez faire approach to economic regulation and began scrutinizing economic regulations under the deferential rational basis standard.[110]

Although the Court long ago discarded the notion that Due Process guarantees economic rights, modern Due Process jurisprudence continues to ground a wide range of substantive rights in the Due Process Clause. Relying on notions of privacy and autonomy, the Court has recognized the right to marital sexual intimacy,[111] abortion,[112] to freely choose one's familial living arrangements,[113] and more recently, the right to be free from the arbitrary imposition of excessive damage judgments in civil litigation.[114] Although there is little agreement among scholars as to the proper scope of substantive due process rights, scholars readily agree that the Due Process Clause guarantees a minimum level of procedural fairness. Cooley's broad definition of due process,[115] contemporaneous with the passage of the 14th Amendment, however, supports a broader reading of the notion of due process than this minimal threshold.

New York, 198 U.S. 45, 46 (1905).

107. Adkins v. Children's Hosp., 261 U.S. 525 (1923).

108. Williams v. Standard Oil Co., 278 U.S. 235 (1929).

109. *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting). In the same paragraph, Justice Holmes noted that "a Constitution is not intended to embody a particular economic theory." *Id.* These statements demonstrate the tension that exists between a legal system based in text and precedent and the rapidly evolving American society when one remembers Justice Holmes' statement of not ten years before that "the man of the future is the man of statistics and the master of economics." *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

110. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 381 (1937).

111. Griswold v. Connecticut, 381 U.S. 479 (1965).

112. Roe v. Wade, 410 U.S. 113 (1973) (noting, however, that the right to terminate a pregnancy is not absolute and that the state may impose limitations or restrictions on this right). *See also* Planned Parenthood v. Casey, 505 U.S. 833, 846-47 (1992) (easing judicial scrutiny of states' limitations on abortion and shifting its emphasis from a basis in the right to privacy to a basis in the notions of bodily integrity and autonomy).

113. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

114. BMW v. Gore, 517 U.S. 559 (1996).

115. *See supra* notes 104-105 and accompanying text.

(3) Justice On Our Side?

The Court has recognized the "vagaries of eyewitness identification," stating that "the annals of criminal law are rife with instances of mistaken identification."[116] In *U.S. v. Wade*, the Court discussed the problems with suggestive identification procedures, with eyewitnesses solidifying their memories based on a pre-trial lineup selection, and with the inability to reconstruct the identification procedure accurately at trial.[117] After noting that lineups constituted "a process attended with hazards of serious unfairness to the criminal accused," the court found eyewitness lineups to be a "critical stage" of a criminal prosecution, requiring the presence of counsel.[118] Although *Wade* relied on the Sixth Amendment and not the Due Process clause, the decision in *Wade* recognizes the need to implement unbiased processes to ensure the fairness and accuracy of criminal trials. Moreover, because the Sixth Amendment right to counsel only attaches once formal charges have been brought against a criminal defendant,[119] a defendant must rely on the Due Process clause when challenging the integrity of a pre-indictment eyewitness line-up.[120]

In *Simmons v. U.S.*,[121] the Court announced that the use of a procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" would violate an accused's Due Process rights.[122] In *Foster v. California*,[123] the Court found a due process violation in a series of suggestive lineup confrontations. In general, however, defendants' claims of overly-

116. U.S. v. Wade, 388 U.S. at 228 (1967) (citing BORCHARD, CONVICTING THE INNOCENT; FRANK & FRANK, NOT GUILTY; WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES; 3 WIGMORE, EVIDENCE § 786a (3d ed. 1940); ROLPH, PERSONAL IDENTITY; GROSS, CRIMINAL INVESTIGATION 47-54 (Jackson ed., 1962); WILLIAMS, PROOF OF GUILT 83-98 (1955); WILLS, CIRCUMSTANTIAL EVIDENCE 192-205 (7th ed. 1937); WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 250-253 (3d ed. 1937)).

117. *Id.* at 228-31.

118. *Id.* at 234.

119. Kirby v. Ill., 406 U.S. 682, 690 (1972). Although the Court declined the extension of *Wade* to pre-indictment lineups in *Kirby*, one article has noted that the political restructuring of the Court during the Nixon administration was ultimately responsible for the reversal of the Court's earlier, but unissued, opinion extending *Wade* to pre-indictment lineups. Craig M. Bradley & Joseph L. Hoffmann, *"Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889, 892 n.13 (2001) (citing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 63-64 (1988)).

120. Manson v. Brathwaite, 432 U.S. 98, 113 (1977) ("The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment.").

121. 390 U.S. 377 (1968).

122. *Id.* at 384.

123. 394 U.S. 440, 442 (1969).

suggestive identification procedures have failed.[124] Moreover, the opinion in *Simmons* limited the general applicability of cases finding due process violations when it proclaimed that "each case must be considered on its own facts."[125]

In this area, however, the Court cannot accept a substitute for the most accurate procedure and continue to declare such a procedure fair. Because the Court in *U.S. v. Ash*[126] held that suspects do not have a Sixth Amendment right to have counsel present when witnesses look at photographic lineups or during pre-indictment lineups, there is a particular need to employ the procedure known to be most accurate to counter any suggestive police behavior that may occur outside of the watchful eye of defense counsel. Only by doing so will justice be served.

IV. A New Mode

A. Giant Steps

Despite the fact that few law enforcement agencies have reacted to the considerable body of research in the area of eyewitness identifications and lineup procedures, the research has not gone unnoticed. The Department of Justice ("DOJ") has publicly stated that "[*s*]*cientific research* indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness *sequentially*—once at a time—rather than simultaneously."[127] The DOJ does not marginalize the research by describing it as "social science" research. In describing the research as "scientific," the DOJ has taken an essential step in equating psychological research with what has traditionally been termed the "hard" sciences.[128] Despite its

124. Neil v. Biggers, 409 U.S. 188, 196-98 (1972) (citing Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (finding no due process violation in identification based on the 'totality of the circumstances'); Simmons v. United States, 390 U.S. 377, 384 (1968) (affirming admission of identification based on photo lineup procedure); Foster v. California, 394 U.S. 440, 442 (1969) (finding a succession of suggestive lineup confrontations to have violated defendant's due process); Coleman v. Alabama, 399 U.S. 1, 90 (1970) (admitting an in-court identification by witness who had a fleeting look at the suspect in the headlights of a passing car)).

125. 390 U.S. at 384.

126. 413 U.S. 300, 321 (1973). The Court in *Ash* declined to consider the question of whether the photographic display violated the defendant's due process rights under the *Simmons* standard. *Id.*

127. NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 9 (1999) (emphasis added) [hereinafter DOJ GUIDE].

128. After the Court's decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the trial judge's "gatekeeper" function under *Daubert* applies to all expert testimony, and the distinction has less significance for the purposes of litigation.

recognition of the value of sequential lineups, the DOJ's Guide states that there is no preferred manner for conducting lineups and explicitly states that inclusion of sequential lineup procedures in the Guide "does not indicate a preference for sequential procedures."[129]

Also, significantly, the state of New Jersey has made major strides toward improving the fairness of its criminal justice system through more accurate appraisals of eyewitness identification procedures. First, the New Jersey Supreme Court in *State v. Cromedy*[130] found reversible error in a trial court's refusal to issue a jury instruction on the possible risks of inaccuracy in cross-racial identifications when such an "identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."[131] The thorough decision in *Cromedy* surveyed the extensive literature in the area of eyewitness identification reliability and drew upon a range of judicial opinions, scholarly articles, and reports in issuing its edict.

In another major step toward improving the accuracy of the criminal justice system, New Jersey Attorney General John Farmer in April 2001 issued new Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures ("Guidelines").[132] The Guidelines require that "[w]hen possible, photo or live lineup procedures should be conducted sequentially."[133] The memorandum accompanying the distribution of the Guidelines notes that the Guidelines:

129. DOJ GUIDE, *supra* note 127, at 9.

130. 727 A.2d 457, 467 (N.J. 1999).

131. *Id.* Although future cases have declined to expand the scope of the decision in *Cromedy*, *see, e.g.*, *State v. Valentine*, 785 A.2d 940, 941 (finding that *Cromedy* does not require a jury instruction regarding cross-ethnic identifications), these cases do not undercut the importance of the court's decision nor do they undermine the research upon which the decision in *Cromedy* is based.

132. N.J. DEPT OF LAW AND PUBLIC SAFETY, OFFICE OF THE ATTORNEY GENERAL, GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES, April 18, 2001 [hereinafter N.J. GUIDELINES], *available at* psych-server.iastate.edu/faculty/gwells/homepage.htm.

133. *Id.* at 1. In cases where sequential lineups are impracticable, the Guidelines provide procedures to reduce the suggestiveness of the procedure. *Id.* at 3-6. The Guidelines also recommend that agencies "utilize . . . someone other than the primary investigator assigned to a case to conduct both photo and live lineup identifications . . . to avoid any inadvertent body signals or cues to witnesses . . . [which] occur when the identity of the actual suspect is known to the individual conducting the identification procedure." Memorandum from the N.J. Dept of Law and Public Safety, Office of the Attorney General, Re: Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1-2 (April 18, 2001) [hereinafter Guidelines Memo] *available at* http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf.

> which incorporate more than 20 years of scientific research on memory and interview techniques, will improve the eyewitness identification process in New Jersey to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence.... With these Guidelines, New Jersey will become the first state in the Nation to officially adopt the recommendations issued by the [DOJ].[134]

In an effort to speed up the "steep learning curve" required to implement the new procedures,[135] the Attorney General's office sponsored hundreds of training sessions on the new Guidelines and New Jersey police agencies began to implement the new procedures on October 15, 2001.[136] One New Jersey police chief noted that the procedures did not present a major inconvenience, and other departments have taken steps to improve upon the basic procedure the Guidelines offer.[137] In light of the relatively painless experience in New Jersey, other jurisdictions have little justification for dragging their feet in adopting sequential lineup procedures.[138]

B. The Logical Progression

The Court should acknowledge what researchers in the area take for granted and what law enforcement agencies are beginning to recognize: sequential lineups increase predictive accuracy in eyewitness identifications over the levels achieved through traditional lineup procedures with little or no additional effort required on the part of law enforcement officials. The New York Supreme Court recently ordered the Department of Corrections to conduct a double blind sequential lineup in one case, noting the unanimity of opinion in the scientific community that sequential lineups are better in terms of accuracy and fairness.[139] In his opinion, Justice Robert S. Kreindler noted that "[t]he additional inconvenience of requiring law enforcement agents to conduct a double blind sequential lineup rather than a simultaneous lineup is minimal if not non-existent."[140]

134. Guidelines Memo, *supra* note 133, at 1.

135. *Id.* at 3.

136. William Kleinknecht, *Mugshot Rule Is Changed to One at a Time*, NEWARK STAR-LEDGER, Oct. 15, 2001, *available at* 2001 WL 28898898.

137. *Id.*

138. The research hasn't convinced everybody, however. One article has noted that South Florida law enforcement agencies will not be implementing the procedures adopted in New Jersey in spite of two recent high-profile cases involving convictions overturned based on DNA evidence, one of which relied heavily on eyewitness identification. *See* Nancy L. Othon, *Florida Retains Witness Routine Side-by-Side Photo Identification to Stay*, FLORIDA SUN SENTINEL, Aug. 13, 2001 at 1B, *available at* 2001 WL 22749074.

139. *In re* Investigation of Thomas, 733 N.Y.S.2d 591, 595 (N.Y. App. Div. 2001).

140. *Id.* at 596.

C. A Dissonant Chord

Although the Court in *Neil v. Biggers* acknowledged that the reason for finding suggestive identification procedures violative of due process was that they increase the likelihood of misidentification,[141] it is unlikely that the Court would extend this logic beyond a case-specific inquiry into a general critique of simultaneous line-ups in the wake of its decision in *McClesky v. Kemp*.[142] In *McClesky*, a black defendant appealed to the court on the basis that his death sentence violated both the Equal Protection Clause and the Eighth's Amendment's prohibition of cruel and unusual punishment because of unequal applications of the death penalty among defendants.[143] McClesky's claim was based on the Baldus study, a remarkably sophisticated[144] study that uncovered racial disparities in the application of the death penalty in Georgia.[145] In spite of the Court's acknowledgement of the scope of the study and the apparently stark evidence of unequal applications of the death penalty, the Court ruled against McClesky on the grounds that there was no proof "that race was a factor in McClesky's particular case."[146] Under this application, studies demonstrating general inaccuracies in procedures will never amount to anything more than interesting information for the court to acknowledge and promptly dismiss.[147]

Conclusion

Perhaps the Court's reluctance to ground its decisions in the science of the day demonstrates a vanity that is not unjustified in light of the history of the evolution of knowledge. No one wishes to appear foolish to one's progeny. Today, few, if any, scientists would argue, as Louis Brandeis did with his brief in *Muller*, that men and women's physical differences mandate different treatment in the workplace. Likewise, the science of eugenics upon which Justice Holmes based his decision for the court in *Buck v. Bell*[148] is farthest from fashion among those who consider themselves to be well-

141. *Biggers*, 409 U.S. at 198.

142. 481 U.S. 279 (1987).

143. *Id.* at 286.

144. The Court itself referred to the study as "actually two sophisticated statistical studies that examine over 2,000 murder cases." *Id.*

145. *Id.* at 286-87.

146. *Id.* at 297.

147. Professor David Faigman has commented that the Court's holding in *McClesky* "that the Eighth Amendment required a particularized showing of discrimination in the petitioner's own case... rendered the statistical proof irrelevant." FAIGMAN, *supra* note 49, at 117.

148. Buck v. Bell, 274 U.S. 200 (1927) (Holmes, J.) (stating that "[t]hree generations of imbeciles are enough").

educated. Few would dismiss outright, however, Justices Holmes and Brandeis's contributions to the history of jurisprudence on the basis of their reliance upon the thoughts of their day in their work. Rather, these opinions' flaws demonstrate that the quest for truth evolves with humankind's ability to frame the inquiry, to investigate, and, ultimately, to ascertain the truth. Justice Cardozo believed that a judge should draw at least partly on "his study of the social sciences" in the process of legal reasoning.[149] Cardozo noted, however, that "[s]ociology would petrify with a rigidity more fatal than that of logic, or rather, with a logic of its own, if its hypothesis were treated as finalities. 'The problem,' in the words of [John] Dewey, 'is one of continuous, vital redemption.'"[150] In spite of the difficulty in identifying, let alone hitting, the moving target of scientific progress,[151] courts must not shrink from their task of recognizing scientific truths when presented with them.

To banish scientific advancements from the realm of constitutional law is to ground the narrative of constitutional jurisprudence in myth and to shroud the people's fate in mystery. Moreover, a lack of willingness to base its decisions in well-supported scientific research supports the perception that the Court's opinions are nothing more than just that: the opinions of a group of nine people assembled under the guise of law. Courts need not engage in a battle of experts. To do so would equally undermine the prestige of the judiciary and further politicize, or at least create an air of politicking about, the struggle to determine the law of the land. But when widely accepted scientific evidence supports the proposition that one process is more accurate than another, the Court does itself and all citizens a great injustice in accepting that anything less than the best is "due."

This note presents a case for a normative view of the Due Process Clause that would require the Court to rely upon widely accepted research in finding inadequate "process of law" in current approaches to eyewitness identification procedures. In the end, it is ironic that social scientific research seems destined to be relegated to a mere footnote in the annals of constitutional jurisprudence. A

149. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 85-86 (1924).

150. *Id.* at 85 (quoting JOHN DEWEY, HUMAN NATURE AND CONDUCT 240 (1922)).

151. Judge William Schwarzer has noted the difficulty judges face in distinguishing scientific theory from fact, but warns people not to forget the burden of proof and the simple fact that that "judges—and juries—are not charged with determining the absolute truth of scientific propositions, or of anything else." William W. Schwarzer, *Encounter in the Courtroom: Federal Judges Meet Science, available at Westlaw,* C554 ALI-ABA 155. For further discussion of the integration of the evolving body of scientific knowledge into the law, see David L. Faigman, *Mapping the Labyrinth of Scientific Evidence,* 46 HAST. L.J. 555 (1995).

system lacking in self-critical appraisal of the fairness of its procedures will fail to deliver a just result. Moreover, to treat as equal those which are plainly unequal, rather than evaluating each according to merit,[152] is to give injustice the imprimatur of law.

152. *See generally* ARISTOTLE, NICOMACHEAN ETHICS, Bk. V, Ch. 3.

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